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In the
Supreme Court of the United States
OCTOBER TERM, 1987

AMF TUBOSCOPE, INC.,
Petitioner

versus

HOUSTON OIL AND MINERALS CORP.,
Respondent,

AMERICAN INTERNATIONAL TOOL COMPANY,
Respondent,

AND

OIL TOOL MACHINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a case involving property damage claims resulting from the failure of a component part of a jack-up drilling vessel operating on the high seas, the United States Court of Appeals for the Fifth Circuit erred in concluding that maritime jurisdiction did not exist and that maritime law was inapplicable.

LIST OF INTERESTED PERSONS

1. Houston Oil and Minerals Corporation — Plaintiff/Respondent

2. Tenneco, Inc. — the parent company of Houston Oil and Minerals Corporation

3. American International Tool Company — Defendant/Cross-Claim Plaintiff/Respondent

4. AMF Tuboscope, Inc. — Defendant/Cross—Claim Defendant/Petitioner

5. AMF, Inc. — the parent company of AMF Tuboscope, Inc.

6. Oil Tool Machine — Defendant/Respondent

7. Gibraltar Insurance Company — Defendant/Respondent[1]

8. Pinetop Insurance Company — Defendant/Respondent[2]

9. Marine Drilling Company — Third Party Defendant/Respondent

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[1] Gibraltar Insurance Company is the primary insurer of American International Tool Company.

[2] Pinetop Insurance Company is the excess insurer of American International Tool Company.

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AND

OIL TOOL MACHINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, AMF Tuboscope, Inc., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered September 24, 1987, and the denial of the Petitions for Panel Rehearing and/or Rehearing *En Banc* entered on October 30, 1987.

OPINIONS BELOW

The Court of Appeals rendered its opinion on September 24, 1987 (App. at A-1, *infra*). This opinion is reported at 827 F.2d 1049.

The district court issued its "Findings of Fact and Conclusions of Law" on February 19, 1986 (App. at A-21, *infra*). An amendment thereto was issued on March 3, 1986 (App. at 42, *infra*). Neither of these opinions is reported.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals (App. at A-1, *infra*) was entered on September 24, 1987. A Petition for Panel Rehearing and/or Rehearing *En Banc* was denied on October 30, 1987 (App. at A-19, *infra*). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 46 U.S.C.A. § 740 (ADMIRALTY EXTENSION ACT) Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency

owning or operating the vessel causing the injury or damage.

* * * * * * * * *

2. 43 U.S.C.A. § 1333 (OUTER CONTINENTAL SHELF LANDS ACT):

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction;

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer

margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the proper y and natural resources thereof or the revenues therefro...

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers'Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section-

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[1] So in original. Probably should be "settling".

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT OF THE CASE

Acting through its parent corporation, Tenneco, Inc., Houston Oil and Minerals Corporation (hereinafter "HOM"), a co-owner and operator of an oil, gas and mineral lease on the outer Continental Shelf in Vermilion Block 75, offshore Louisiana, arranged for Marine Drilling Company (hereinafter "Marine Drilling"), a drilling contractor, to drill a well on the lease. The well was drilled from Marine Drilling's jack-up drilling vessel, the "J STORM IX", which at all pertinent times was working in navigable waters in the Gulf of Mexico, offshore of the state of Louisiana, on the outer Continental Shelf.

This litigation arose from the failure of a "mud saver sub", a solid steel pipe-like device which was a component part of the "J STORM IX". The mud saver sub is approximately three feet in length and is used as a connector between the kelly, the portion of the pipe that goes through the rotary table, and the drill stem. The sub serves two functions: to prevent the waste of drilling mud in the kelly when the pipe is "broken off" (unscrewed) during entry or withdrawal from the hole, and to bear the brunt of the

forces and stresses involved in "breaking" and "making up" the drill stem during the addition or removal of joints of pipe.

Oil Tool Machine (hereinafter "Oil Tool") fabricated the sub to the specifications of American International Tool Company (hereinafter "AITCO") and sold it to them. AITCO, in turn, employed AMF Tuboscope (hereinafter "AMF") to inspect this and several other new subs in order to detect any cracks therein. Ultimately, AITCO leased the sub in question to HOM which, in turn, put the sub into use aboard the "J STORM IX".

On January 4, 1982, Marine Drilling was cleaning and smoothing the drilling hole when the sub broke. At the time, the bottom of the hole was at 14,649 feet and the drill string was extended to a point where the drill bit was approximately 375 feet from the bottom of the hole. After the break, the drill stem fell down to the bottom of the hole. "Fishing" operations were successful in recovering the portion of the drill stem closest to the surface. Ultimately, however, the well had to be "side-tracked" and redrilled, resulting in the loss of approximately 22 days of drilling time.

HOM filed suit in the United States District Court for the Western District of Louisiana, naming AITCO, Oil Tool and AMF, among others, as defendants. A variety of cross and third-party complaints followed, including a tort indemnity claim by AITCO against AMF. The case was tried to conclusion on September 9 through 11, 1985 before the Honorable Daniel H. Thomas of the Southern District of Alabama, sitting by designation.

Two defendants, Armco, Inc. (the manufacturer of the bar stock from which the sub was manufactured) and Metal-X Corporation (which purchased the stock from Armco and then sold it to Oil Tool) were dismissed by the district court on motions for directed verdict and are no

longer parties to this action. Prior to trial, Oil Tool became insolvent. Its counsel withdrew from the proceedings and it was unrepresented at both the trial and appellate levels in these proceedings.

The trial court applied Louisiana law through the Outer Continental Shelf Lands Act (hereinafter "Lands Act"), 43 U.S.C.A. § 1331 *et seq.* AMF, Oil Tools and AITCO were all found liable for the failure of the mud saver sub. Judgment was entered in favor of HOM and against Oil Tool, AMF and AITCO, jointly and severally, in the amount of $1,143,719.41, together with interest from the date of judgment. All cross and third-party demands were dismissed by the trial court.

Numerous appeals and cross and cross-appeals were taken to the United States Court of Appeals for the Fifth Circuit. In responding to AITCO's cross-appeal on the indemnity issue, AMF pointed out that maritime jurisdiction and, accordingly, maritime law should have been applicable in this case. Reference to the Fifth Circuit's September 24, 1987 decision in this case illustrates the judges Politz, Reavley and Higginbotham were of similar opinion. However, under the Fifth Circuit's internal rules, this panel was bound to follow a previous panel decision in *Sohyde Drilling and Marine Co. v. Coastal Gas Prod. Co.*, 644 F.2d 1132 (5th Cir. 1981), *cert denied* 454 U.S. 1081, 102 S.Ct. 635, *rehearing denied* 455 U.S. 983, 102 S.Ct. 1494. In accordance with that case, the court here denied the application of maritime law, choosing instead to apply Louisiana law through the Lands Act.

Under Louisiana law, the Fifth Circuit found AITCO liable on products liability theories, Oil Tool liable for negligence in the manner in which it machined the sub and AMF liable for negligence in its inspection of the sub. The Court went on to award AITCO full indemnity on its claims

against Oil Tool and AMF under a Louisiana law "active/passive" indemnity theory. This result is wholly inconsistent with maritime law, which would require fault to be apportioned on a percentage basis among the defendants. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975). The Fifth Circuit also awarded pre-judgment interest at the Louisiana statutory rate of 12%, rather than the lower federal interest rate which would have been applicable if the trial court had applied maritime law and had, in its discretion, chosen to award pre-judgment interest.

In a case in which the award now stands, after appellate review, at $1,075,462.90, plus judicial interest[1], the serious impact of the Fifth Circuit's failure to apply maritime law becomes obvious. This is particularly true in view of the fact that AMF, due to Oil Tool's insolvency, will be forced to bear the entire brunt of this judgment should it be allowed to stand.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN REFUSING TO RECOGNIZE MARITIME JURISDICTION OR APPLY MARITIME LAW DESPITE THE FACT THAT THE PROPERTY DAMAGE CLAIMS INVOLVED HERE AROSE FROM THE OPERATION OF A VESSEL ON THE HIGH SEAS

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[1] The district court found Houston Oil to be entitled to damages in the amount of $1,143,719.41. On appeal, the Fifth Circuit reduced this award by $79,545.50 (an amount which HOM claimed should be charged to the "J STORM IX" as a pro-rata portion of overhead cost during the extra days that it worked as a result of this incident). However, the Fifth Circuit increased the award to include one-half of each of the following amounts: $7,109.00 for Schumberger Logging Unit Rental; $4,165.00 for drilling control monitors; and $11,304.00 in engineering salaries. The $1,075,462.90 figure is reached by factoring these modifications into the district court's award.

In affirming the district court's application of Louisiana law to this case, the Fifth Circuit recognized that the jurisdiction and choice of law questions presented here were "important issue(s) worthy of discussion". *Houston Oil*, 827 F.2d at 1052. After extensively analyzing and criticizing a prior Fifth Circuit panel's decision in *Sohyde Drilling and Marine Co. v. Coastal Prod. Co.*, 644 F.2d 1132 (5th Cir. 1981), *cert denied* 454 U.S. 1081, 102 S.Ct. 635, *rehearing denied* 455 U.S. 983, 102 S.Ct. 1494, the Fifth Circuit in this case noted that under its internal operating rules, the holding in *Sohyde* was binding in this case. The Court therefore followed the *Sohyde* rationale and applied Louisiana law, through the Lands Act, to all claims raised here.

1. *No "Maritime Nexus" Need be Shown in Tort Cases Involving Vessels Engaged in Operations Upon the High Seas*

Traditionally, maritime tort jurisdiction has been synonymous with "locality". In recent years, however, this Court has imposed the additional requirement of a "maritime nexus" when torts have occurred on navigable waters within the United States. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), *rehearing denied* 459 U.S. 899. Last term, this Court explicitly refused to determine whether "a maritime nexus also must be established when a tort occurs on the high seas". *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. ____, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). The instant case squarely presents this question for determination.

In the instant case, the claims asserted against AMF and the other defendants were clearly based upon tort prin-

ciples, and the events involved clearly occurred on the high seas. The accident was found by the district court to have resulted from a defective and unseaworthy appurtenance of the vessel, its mud saver sub, having fractured and caused the drill stem, which was formerly attached to the vessel, to fall to the bottom to the hole. It is undisputed that at the time of the accident, the "J STORM IX", a jack-up drilling vessel, was jacked up on the high seas, on the outer Continental Shelf, many miles from land.

Jack-up drilling rigs such as the "J STORM IX" have traditionally been treated as vessels. General maritime law remedies for unseaworthiness, maintenance and cure, and statutory rights under the Jones Act, 46 U.S.C.A. § 688, have long been extended to certain oilfield employees working on special purpose craft engaged in the exploration for oil and gas lying beneath navigable waters. *See, Offshore Co. v. Robison,* 226 F.2d 769 (5th Cir. 1959). The treatment of jack-up rigs as vessels by the lower courts was explicitly recognized by this Court in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 84 L.Ed.2d 406, 105 S.Ct. 1421 (1985). There, it was stated:

> "Offshore oil rigs are of two general sorts: fixed and floating. (Citations omitted). Floating structures have been treated as vessels by the lower courts. *E.G., Producers Drilling Co. v. Gray,* 361 F.2d 432, 437 (5th Cir. 1966). Workers on them, unlike workers on fixed platforms, *See Rodrigue v. Aetna Casualty and Surety Co.,* 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. 1835 (1969), enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters.

In view of the aforementioned authorities, it appears clear that the instant case presents a tort action whose underlying events occured aboard a vessel operating on the high seas. Petitioners submit that admiralty and maritime jurisdiction automatically exists in such a case.

In *Executive Jet, supra,* this Court announced that in addition to meeting the locality requirement, a tort, in order to fall within maritime jurisdiction, must have a "maritime nexus". This concept was further described by stating that the wrong must bear "a significant relationship to traditional maritime activity".

Executive Jet, of course, involved the crash of a land-based aircraft into Lake Erie while on a flight between points within the continental United States. The decision mentions several times that it was merely fortuitous that Executive Jet Aviation's plane happened to come to rest in navigable waters, rather than on land. This concern about the fortuitous nature of the event seems to have inspired the holding that some maritime nexus other than mere locality must be shown in order to sustain maritime jurisdiction. In so holding, this Court noted that the locality test had generally worked quite satisfactorily, and that:

> . . . It is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction. 409 U.S. at 253, 34 L.Ed.2d at 459.

Thus, it appears that the "maritime nexus" requirement of *Executive Jet* was developed in large part to deal with "borderline situations" in which the locality test is met due to some purely fortuitous circumstances. It is not surprising that most of these situations arise in inland waters, near docks and piers, where fortuitous contact with the water is more likely to occur.

Petitioners submit that there is nothing fortuitous about the locality of a jack-up drilling vessel operating on the high seas, just as there is nothing fortuitous about the locality of any other vessel operating upon the high seas. The operation of vessels on the high seas has long been the stuff with which the law of the sea is concerned. In such circumstances, the "maritime nexus" test is not necessary because it is met as a matter of course. The "maritime nexus" requirement is basically a safeguard to ensure that admiralty jurisdiction is not extended to claims which have only accidental and tangential connection to traditional admiralty concerns. Its protection is not needed when the claim arises out of a tort occurring on the high seas, since such an event will nearly always be directly related to and concerned with the principles with which admiralty jurisdiction and law were designed to deal.

One would be hard pressed to conceive of a situation involving a greater maritime "maritime nexus" than one in which a tort occurs aboard a vessel which is operating on the high seas. Petitioners submit that the question reserved in *East River, supra* — whether a maritime nexus also must be established when a tort occurs on a vessel on the high seas — should be answered in the negative. Such a holding would simplify jurisdictional determinations without doing violence to the principle for which *Executive Jet* stands. It would also have the effect of eliminating inconsistent and confusing rulings such as those made in *Sohyde* and the instant case.

2. Even if a Showing of "Maritime Nexus" Were Required Here, Such a Nexus Clearly Exists

In following *Sohyde* and refusing to apply maritime law to this case, the Fifth Circuit looked to this Court's decision in *Herb's Welding, supra* for "atenuated" support. *Houston Oil*, 827 F.2d at 1053. The Fifth Circuit

apparently felt that the holding in *Herb's Welding* that work aboard an offshore drilling platform is not inherently "maritime employment" as that term is used within the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, could be read to indicate some support for *Sohyde's* contention that drilling conducted from a vessel lacks a "maritime nexus". Petitioners believe that this analysis is faulty.

Herb's Welding dealt with *fixed* production platforms located in state territorial waters, and concerned only the question of what activities constitute "maritime employment" under the LHWCA. This is a somewhat different analysis than is the "maritime nexus" test, since "maritime employment" looks to the injured worker's entire job, unlike "maritime nexus," which looks to the nature of the particular wrong. As a result, the "maritime employment" cases are of questionable precedential value when performing a "maritime nexus" analysis.

This Court's opinion in *Herb's Welding* specifically recognized that the square holding of the case did not affect the status of oilfield workers aboard special purpose drilling vessels. Those individuals have been held by lower courts to be covered by the LHWCA since they are employed on navigable waters. *Herb's Welding*, 470 U.S. at 416, n.2; 84 L.Ed.2d at 410, n.2. For example, a well-reasoned line of Fifth Circuit cases has reached this conclusion based on the belief that "maritime employment" under LHWCA includes offshore drilling and related activities conducted from vessels. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981); *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1982)(*en banc*), *cert denied* 459 U.S. 1170, 103 S.Ct. 815; *Thorton v. Brown & Root, Inc.*, 707 F.2d 149, 153 (5th Cir. 1983), *cert denied* 464 U.S. 1052, 104 S.Ct. 735, 79 L.Ed.2d 194 (1984). To

whatever extent *Herb's Welding* could be read to support the proposition that drilling activity from a *fixed platform* would not satisy the "nexus" test, these cases, several of which were cited with approval in *Herb's Welding*, can be read to indicate that drilling and related activities conducted from a *vessel* would satisfy the "maritime nexus" requirement.

Petitioners believe that the existence of a "maritime nexus" in offshore drilling vessel cases was eloquently and correctly discussed in *Terra Resources v. Atchafalaya Workover Contracts, Inc.*, 1980 A.M.C. 1082 (E.D.La. 1980). There, the district court, in a pre-*Sohyde* decision, found maritime law applicable to property damage claims arising out of a blow-out aboard a jack-up drilling vessel operating off the coast of Louisiana.[2] The Court stated:

> In addition, this well blow-out bears a significant relationship to traditional maritime activity. In light of the nearly thirty years of mineral development by daily usage of thousands of similar vessels in admiralty waters, one can hardly argue that this offshore search for oil and gas by means of a vessel does not constitute 'traditional maritime activity'.
>
> Also, public policy certainly favors admiralty jurisdiction in this case. An important national interest in uniformity of law and remedies for

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[2] *See also, In Re Incident Aboard D/B OCEAN KING*, 758 F.2d 1063 (5th Cir. 1985), *subsequent appeal* 813 F.2d 679 (5th Cir. 1987), a post-*Sohyde* case involving personal injury and property damage claims exceeding $100,000,000.00 Despite the fact that, like *Sohyde*, the claims arose from a blow-out aboard a jack-up rig in its jacked-up position, the *Sohyde* case was not even mentioned, and maritime law was uniformly applied to all claims. *Terra Resources* and *In Re Incident Aboard D/B OCEAN KING* illustrate that maritime jurisdiction has been assumed to extend to special purpose vessel property damage cases, both before and after *Sohyde*.

> those facing the hazards of the offshore drilling industry exists, mandating the admiralty jurisdiction of federal courts.

In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the Fifth Circuit, interpreting *Executive Jet*, established a four factor test to be considered when performing a "maritime nexus" analysis. These factors were described as: "(1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admmiralty law." *Kelly*, 485 F.2d at 525.

This test is general, nebulous and uncertain, and is subject to manipulation either in favor of or against the existence of jurisdiction. For example, the *Sohyde* court applied the test and found no jurisdiction in a property damage drilling vessel case. However, other courts have had no problem finding a "maritime mexus" in personal injury cases. Indeed, in its opinion in the instant case, the Fifth Circuit stated:

> We take as given that in this Circuit, at least in the area of personal injury, admiralty jurisdiction and the applicability of maritime law to these *Robison*-defined special-purpose watercraft is unassailably established. *Houston Oil*, 827 F.2d at 1053.

This discrepancy in the treatment of personal injury and property damage claims is illogical and untenable.

Although petitioner believes that the *Kelly v. Smith* test is too uncertain to be accurately applied, and that this Court should fashion a less nebulous test, petitioner also believes that a balanced application of the "four factors" supports jurisdiction in the instant case. Properly seen, this is a contest between a vessel charterer (HOM) and the

suppliers of a component part to the vessel (AMF, AITCO and Oil Tool). Thus the "functions and roles of the parties" support jurisdiction. The "type of vehicle and instrumentality" involved here is clearly a vessel engaged in operations on the high seas, which also supports jurisdiction. Similarly, the "causation and type of injury" here was a failure and breaking away of a component part of the vessel, which certainly points to "maritime nexus". Finally, "traditional concepts of the role of admiralty law" also support jurisdiction, since the vessel owner should not be subject to different and potentially conflicting laws each time the vessel moves. Rather, maritime jurisdiction and law should be applied to all aspects of this case, including the claims for sub-surface damage to the hole. Jurisdiction properly reaches these claims through the Admiralty Extension Act, 46 U.S.C.A. § 740.

3. The Rule of the Sohyde Case is in Conflict with Numerous Decisions, Including Decisions of this Court, and Should Be Overruled

As mentioned above, the Fifth Circuit in this case felt compelled to apply non-maritime principles as a result of a prior Fifth Circuit panel decision in *Sohyde, supra*. *Sohyde* involved a blow-out which occurred during workover operations performed from a submersible drilling barge resting on the bottom of an inland Louisiana waterway at the end of a dead end, man-made canal. Applying the two-prong test of *Executive Jet*, the Court found that the case lacked maritime flavor and should be governed by Louisiana law. *Sohyde*, 644 F.2d at 1136-37. Petitioners submit that this result was incorrect and should be overruled for several reasons.

First of all, to follow *Sohyde* is to require the application of inconsistent rules of law to different claims arising from a single incident. Fortunately, when the mud saver

sub in this case broke and the drill stem parted, no personal injuries were sustained. However, it is easy to envision such a situation. Under the rule of *Sohyde*, maritime law would apply to the personal injury claims while it would not apply to the property damage claims. As a result, juries, which are already called upon to sort out a number of nebulous concepts under maritime law, would be additionally burdened by the task of sorting out property damage claims under what may be completely dissimilar principles of state law. This, of course, invites the spector of unwanted confusion with a potential for unjust results and a loss of the uniformity that admiralty seeks to provide. The need for a uniform admiralty and maritime law to be applied to special purpose vessels is no less compelling in property damage cases than it is in personal injury cases.[3]

Petitioners would also point out that maritime law is applied to special purposes vessels in other settings in addition to those involving personal injuries. For example, the interpretation and enforcement of drilling contracts involving special purpose vessels has been held to be a function of maritime law. *Corbitt v. Diamond M Drilling Co.*, 654 F.2d 329, 332 (5th Cir. 1981). Maritime law has also been held applicable when special purpose vessels are involved in collisions, even when only property damage claims result. *Marathon Pipeline v. Drilling Rig* ROWEN/ODESSA,

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[3] Interestingly, the Congress did not see fit to differentiate between personal injury and property damage claims when it extended admiralty jurisdiction via the Admiralty Extension Act, 46 U.S.C.A., § 740. The act provides, in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include *all cases of damage or injury, to person or property,* caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. (Emphasis added).

761 F.2d 229 (5th Cir. 1985). Presumably, maritime law would be held applicable to the sinking of a jack-up drilling rig. Indeed, if *Sohyde* is good law, it is arguable that the only instance involving a special purpose vessel which would not be controlled by maritime law would be a non-sinking property damage claim resulting from an accident occuring while the vessel is in its submerged position. Such a gap in the application of maritime law does not seem logical, desirable or prudent.

Petitioners submit that the Court in *Sohyde* was strongly influenced by the fact that at the time of the accident, the Sohyde 28 was sitting on the bottom of an inland canal located within the state of Louisiana. In this respect alone, *Sohyde* is distinguishable from the instant case, which involved a rig jacked up above the high seas on the outer Continental Shelf. Furthermore, *Sohyde* can clearly be distinguished from the instant case because the damage in *Sohyde* was caused by a blowout originating from the geologic formation itself and traveling upward to the vessel. In the instant case, on the other hand, the damage was caused by the breaking of a part of the vessel and traveled down to the hole, an occurrence which certainly appears more "maritime".

It is arguable that the *Sohyde* Court saw a distinction between a special purpose vessel in its submerged position at the time of the accident and a special purpose vessel actually in the process of navigation, to which maritime law would undisputably be applicable. *See, Marathon Pipeline, supra.* Petitioners submit that such a distinction is completely untenable. To find maritime law inapplicable to special purpose vessels which are submerged would be, in some ways, equivalent to finding maritime law inapplicable to traditional vessels at anchor. This would fly in the face of the uniformity which federal maritime law seeks to achieve, since vessels would then sail in and out of maritime jurisdiction.

Significantly, the submerged or non-submerged status of special purpose vessels has never been a factor in determining the law applicable to personal injury claims. On the contrary, most personal injuries on these structures occur when they are in their stationary positions. Again, this disparity in the treatment of personal injury and property damage claims seems to make little sense.

Finally, as the Fifth Circuit noted in its decision in this case, the continued validity of *Sohyde* is called into question by this Court's decision in *Foremost Insurance, supra.* There, this Court found the "maritime nexus" requirement satisfied by a collision of two pleasure craft on a navigable waterway in Louisiana. The Court noted that the *potential* impact on maritime commerce when two vessels collide on navigable waters provided sufficient "nexus" to support a finding of admiralty jurisdiction. Similar interests support a finding of admiralty jurisdiction in cases of property damage aboard movable drilling rigs, since damaged rigs may easily obstruct navigable waterways.

Certainly, the tort involved in the instant case had the *potential* to impact on maritime commerce or navigation. Furthermore, this potential disruption arose out of an activity directly related to maritime commerce, unlike the potential disruption involved in *Executive Jet.* Thus, *Foremost Insurance* would seem to indicate that the results reached in *Sohyde* and the instant case are incorrect.

CONCLUSION

Given the facts that special purpose vessels must coexist with other commercial vessels on the water and that there is a strong need for uniformity and simplicity in the rules governing the activities of such vessels, petitioners

submit that maritime jurisdiction should apply here. In the absence of maritime jurisdiction, the owner of a special purpose vessel, as well as those involved in the furnishing of necessaries to these vessels, will, with regard to property damage claims, be subject to different and potentially conflicting principles of state law each time the vessel is moved, as well as remaining subject to maritime law for personal injury claims and claims arising while the vessel is actually in navigation. Such a situation makes little sense and should not be allowed to continue.

For the above and foregoing reasons, petitioners respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,
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APPENDIX

HOUSTON OIL & MINERALS CORP.,
Plaintiff-Appellee Cross-Appellee and Cross-Appellant,

v.

AMERICAN INTERNATIONAL TOOL COMPANY,
Defendant-Appellee Third Party Plaintiff Cross-Appellant and Cross-Appellee,

GILBRALTER INSURANCE COMPANY,
Defendant-Appellant,

v.

AMF TUBOSCOPE, INC.,
Defendant-Appellant,
Cross-Appellee,

PINE TOP INSURANCE COMPANY,
Defendant-Appellant,

v.

ARMCO, INC., Defendant,

Marine Drilling Company, Third Party
Defendant-Appellee.

No. 86-4360.

United States Court of Appeals,
Fifth Circuit.

Sept. 24, 1987.

Lessee of "mud saver sub" brought action against sub's owner lessor, company which had machined "sub", and company which had inspected "sub," after "sub" broke in two and adversely affected drilling operations. The United States District Court for the Western District of Louisiana, Daniel H. Thomas, J., sitting by designation, awarded damages to lessee, and owner lessor and inspecting company appealed. The Court of Appeals, Politz,

Circuit Judge, held that: (1) maritime law did not govern dispute arising out of property damage resulting from breaking of "sub," and Outer Continental Shelf Lands Act thus made law of state adjacent to accident which occurred in outer continental shelf, Louisiana, applicable; (2) under Louisiana law, owner lessor was liable in products liability and machining and inspecting companies were liable in negligence; and (3) lessee was not entitled to recover as damages pro rata portion of costs of dock and helipad facilities maintained for support of offshore operations that were charged to rig, under internal operating procedures, for additional drilling days to well completion needed due to breaking of "sub."

Modified and affirmed.

John A. Jeansonne, Lafayette, La., for AMF.

John Nickerson Chappuis, Lafayette, La., for American Intern, Tool, et al.

Susan Severance, Nickolas J. Gachassin, Jr., Lafayette, La., for Houston Oil & Marine Drilling.

Appeals from the United States District Court for the Western District of Louisiana.

Before REAVLEY, POLITZ, and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:

American International Tool Company (AITCO), the owner-lessor of a "mud saver sub," a solid steel pipe-like device used in oil well drilling operations, and AMF Tuboscope, Inc., a codefendant who inspected the sub prior

to its use, appeal a judgment after a bench trial awarding damages to Houston Oil & Minerals Corporation, owner of a mineral lease. We modify the judgment and, as modified, affirm.

Background

Houston Oil, co-owner and operator of an oil, gas, and mineral lease acting through its parent corporation, Tenneco, Inc., arranged for Marine Drilling Company, a drilling contractor, to drill a well on its lease. The Houston Oil lease is located offshore Louisiana in Vermillion Block 75. The well was drilled from Marine Drilling's jackup drilling vessel, the J. Storm IX.

The mud saver sub is a tubular, solid-steel tool, approximately three feet in length, used as a connector between the kelly, the portion of pipe that goes through the rotary table, and the drill stem. The device had dual functions: to prevent the waste of the drilling mud in the kelly when the drill pipe is "broken off" (unscrewed) during entry into or withdrawal from the hole, and to bear the brunt of the forces and stresses involved in breaking and "making up" the drill stem during the addition or removal of joints of pipe.

The sub has a box end which connects to the kelly and a pin end which joins to the drill pipe. The center of the housing is bored to receive an internal spring valve. The entire circumference of the center of the sub is machined to create a recessed area approximately six inches in length and one eighth inch deep. A rubber protector is affixed in this area to serve as a bumper or guard when the sub strikes the casing through which the drill pipe passes. Stresses concentrate at the recess and are relieved by smooth curves called fillets. The dynamics are such that curved fillets attract far less stress than those cut at 90

degrees. The sub in the case before us had two fillet radii, one near the box end and one near the pin end.

Oil Tool Machine fabricated the sub and sold it to AITCO, who fitted the internal valve. AITCO employed AMF Tuboscope, an inspection company, to perform a "full-length dry power magnetic particle inspection" on the subject sub and several other new subs. The purpose of the test was to detect any cracks or scoring in the metal. The magnetic particle test is performed by applying a magnetic field to the metal surface to be tested, dusting the surface with fine metal filings and then blowing the fine powder off. Any powder remaining signals a crack or scoring in the metal surface.

There was conflicting evidence whether the AMF inspector found a machining notch. The sub was repaired twice. After a leak was noted, the box end was refaced by OTM. During the second inspection, which extended only to the box and pin end connections, galling of the box end was noted and that end was re-machined. The sub was then rented to Houston Oil.

On January 4, 1982, Marine Drilling was reaming the hole, that is to say, the hole was being cleaned and smoothed. The sub broke in two. The break occurred at the fillet radius on the box end. At that time the bottom of the hole was at 14,659 feet. The drill string was extended to a point where the drill bit was approximately 375 feet from the bottom of the hole. When the sub broke the drill stem fell down the hole.

"Fishing" operations were partially successful. The nearest part of the drilling stem, including the bottom part of the sub, were removed by use of an "overshot." Ultimately, the well had to be "sidetracked" and redrilled. Twenty-two days of drilling time were lost.

Houston Oil sued, *inter alia*, AITCO, OTM, and AMF Tuboscope, urging theories of negligence and products liability. Applying Louisiana law, made applicable by the Outer Continental Shelf Lands Act (Lands Act), 43 U.S.C. §§ 1331-1356, the trial court cost all three defendants in judgment for the damages occasioned by the failure of the mud saver sub. This appeal followed.

Analysis

A. *Choice of law: does maritime law control?*

[1] The parites and the trial court uncritically accepted the application of the Lands Act, which calls into play "as the law of the United States," the law of the state adjacent to the offshore site, in this instance Louisiana. We conclude likewise, but deem this important issue worthy of discussion.

Since Judge Wisdom's definitive opinion for this court in *Offshore Co. v. Robinson*, 226 F.2d 769 (5th Cir. 1959), we have held consistently that the general maritime law remedies for a vessel's unseaworthiness, the protections of maintenance and cure, and the statutory rights provided by the Jones Act, 46 U.S.C. § 688, extend to certain oil field employees working on special purpose watercraft in the exploration for oil and gas lying beneath navigable waters. Our cases applying the Jones Act and general maritime law to accidents aboard submersible, semi-submersible, jackup, and other movable rigs located in inland shallows, on the outer continental shelf, or the high seas, are legion. *See, e.g., Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987)(Jones Act and maritime law applied on jackup rig); *Rogers v. Eagle Offshore Drilling Service, Inc.*, 764 F.2d 300 (5th Cir. 1985)(seaman on inland drilling barge denied recovery, applying Jones Act and general maritime law); *Domangue v. Penrod Drilling Co.*, 748 F.2d 999 (5th Cir. 1984)(Jones Act and general maritime law applied to accident aboard drilling barge);

Wallace v. Oceaneering Int's., 727 F.2d 427 (5th Cir. 1984)(accident aboard semisubmersible rig bolted to Gulf floor); *Lambert v. Diamond M Drilling Co.*, 683 F.2d 935 (5th Cir. 1982)(semisubmersible rig); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975)(maintenance and cure issue on jackup rig); *Case v. D.J. McDuffie, Inc.*, 502 F.2d 969 (5th Cir. 1974)(drill barge unseaworthiness); *Dugas v. Pelican Const. Co.*, 481 F.2d 773 (5th Cir. 1973),(unseaworthiness of inland submersible drilling barge); *Thibodeaux v. Rowan Drilling Co.*, 429 F.2d (5th Cir. 1970)(unseaworthiness of submersible rig afloat in Gulf of Mexico). *See also, D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145 (5th Cir. 1979)(maritime law applied to property damage claim for capsize of submersible drilling barge). We take as a given that in this circuit, at least in the area of personal injury, admiralty jurisdiction and the applicability of maritime law to these *Robison*-denied special purpose watercraft is unassailably established.

In the case at bar we are constrained to apply non-maritime principles as a consequence of our holding in *Sohyde Drilling & Marine Co. v. Coastal Gas Prod. Co.*, 644 F.2d 1132 (5th Cir. 1981). In *Sohyde*, we held that a property-damage claim caused by a well blowout was not governed by maritime law, The blowout occurred during workover operations from a submersible drilling barge resting on the bottom of an inland Louisiana waterway. Analyzing the issue under the two-pronged test of *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972),[1] as refined in the tetrad analysis suggested in *Kelly v. Smith*, 485 F.2d 520 (5th Cir.

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[1] *Executive Jet* added to the traditional navigable water locality test a requirement "that the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268, 93 S.Ct. at 504, 34 L.Ed.2d at 467.

1973),[2] we concluded that the case lacked maritime flavor and would be governed by Louisiana law, 644 F.2d at 1136-37:

> There seems little doubt that if the present action were one for personal injuries under the Jones Act or maritime law sustained by one having the status of a *Robison* seaman that the drilling barge, even in its submerged position, would be considered a "vessel" for purposes of the Act. *See, Offshore Co., v Robinson,* 266 F.2d 769, 779, 1959 A.M.C. 2049 (5th Cir. 1959); *Producers Drilling Company v. Gray,* 361 F.2d 432, 434 (5th Cir. 1966). However, we are not convinced that the term "vessel" for Jones Act purposes, which is subject to liberal construction consistent with the purposes of the Act, is necessarily a vessel for other purposes as well. . . . Although the Sohyde 28 may have had some maritime character at the time of the well blow-out—in the sense that it floated in and presumably would float out—it clearly was not substantial.
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> . . .The record is littered with references of blowout preventers (consisting of pipe rams, blind rams and hydrils), tubing, drilling mud, and the like. none of these instrumentalities have a peculiarly salty flavor.

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[2] The *Kelly court stated:*

> From the facts and analysis of *Executive Jet* and *Peytavin [v. Government Employees Ins. Co.,* 453 F.2d 1121 (5th Cir. 1972)] we can discern factors to be considered in [determining whether admiralty jurisdiction exists]: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of the injury; and traditional concepts of the role of admiralty law.

Likewise, the panel concluded that the alleged causes of the Sohyde accident—failures to operate the rig and properly use and maintain its equipment—"could just as easily have occurred on land." *Id.* In sum, the damages aboard the submerged barge in *Sohyde* were deemed "indistinguishable from those arising from land-based well blowouts." *Id* at 1138.

Sohyde's analysis and holding draws some support, albeit attenuated, from the recent Supreme Court decision in *Herb's Welding v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985), which held, in reversing a panel of this court, that work aboard an offshore drilling platform is not inherently maritime employment under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.[3] Not withstanding such support, we foresee a potential for confusion with our maritime personal injury holdings which eventually may occasion an en banc revisiting of the *Sohyde* rationale.

On a practical level, *Sohyde* requires the application of potentially inconsistent rules of law to different claims arising from a single incident. For example, in the likely

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[3] Although the analysis of maritime employment under the LHWCA, like the *Executive Jet* test for admiralty jurisdiction, involves an analysis of the location where an injury occurs ("situs"), the analyses are not necessarily the same. Nonetheless, the Supreme Court's ruling under the LHWCA in *Herb's Welding* gives some signal of the Court's concept of maritime activity for admiralty purposes. Since *Herb's Welding* involved a personal injury, it may be seen to undermine a traditional rule of the scope of admiralty jurisdiction in offshore oilfield cases involving personal injuries. At least two current members of the Supreme Court have indicated a desire to address the proper scope of the Jones Act. *See International Oilfield Divers, Inc. v. Pickle*,— U.S. —, 107 S.Ct. 939, 93 L.Ed.2d 989 (1987) (White, J., joined by the Chief Justice, dissenting from denial of certiorari).

scenario[4] of a blowout on a movable rig in inland waters causing both personal injury and property damage, maritime law would apply to the latter while state law would govern the former. Juries, already called upon to sort out the differences between unseaworthiness, maritime products liability, maintenance and cure, Jones Act negligence and ordinary negligence—as well as the relative fault of the parties—would draw the added task of sorting out property damage claims under subtly or openly dissimilar state law rubrics. This invites the spectre of unwanted confusion with a potential for unjust results and a loss of the uniformity admiralty law seeks to provide.

The continued vitality of *Sohyde's* restrictive rule is perhaps prejudiced by the decision in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982). In *Foremost*, two pleasure craft collided on the Amite River, a navigable waterway in Louisiana. The district court concluded that because neither boat was engaged in commerce the collision did not bear a sufficient relationship to maritime activity to support admiralty jurisdiction. A panel of this court reversed, noting that to rule otherwise "would be injecting an uncertainty that would plague litigants and the courts." 641 F.2d 314, 316 (1981).

The Supreme Court granted certiorari and affirmed, noting "the *potential* impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional tort tied to the commercial use of a given boat . . . . " 457 U.S. at 677, 102 S.Ct. at 2659, 73 L.Ed.2d at 307-08 (emphasis added). We are inclined to believe that these same interests would support admiralty jurisdiction in cases of property damage aboard movable drilling rigs,

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4. For example, see our recent decision in *In re Incident Aboard D/B Ocean King on 8/30/80*, 813 F.2d 679 (5th Cir.1987). In this factually complex case neither jurisdiction nor choice of law was made an issue or discussed.

since a damaged rig may as easily obstruct a navigable waterway.[5] As *Foremost Insurance* illustrates, actual disruption of commerce need not occur to support jurisdiction. The court should look to the general character of the tort, its actual or *potential* impact on maritime commerce or navigation, and the desirability of the application of uniform law. In the case at bar, as in *Foremosts Insurance,* although there was no actual disturbance of interstate commerce, the potential for it existed. There is also the strong pull of the common thread in all admiralty jurisdiction cases—uniformity and simplicity in governing rules.

[2] For today, however, *Sohyde* impels our resolution. Maritime law is not to be applied. Accordingly, since this accident occurred on the outer continental shelf, and there is no conflict with federal laws or regulations, the law of the adjacent state, Louisiana, becomes surrogate federal law, to be used in resolving this dispute. The decision by the district court to apply the same was correct.

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5. Moreover, this potential disruption arises out of an activity directly related to maritime commerce, differentiating this case from *Executive Jet.* In *Foremost* the Court recognized that the plane crash in *Executive Jet* had the potential to disrupt maritime navigation. *Foremost,* 457 U.S. 668, 675 n. 5, 102 S.Ct. 2654, 2658 n.5. But this potential disruption did not support admiralty jurisdiction because the underlying activity—aviation—was entirely non-maritime. By contrast, the underlying activity in *Foremost*—pleasure boating—was related to maritime activity because pleasure boaters regularly share navigable waters with commercial vessels. the resulting need for uniform navigational rules according to the Court, established a substantial relationship between pleasure boating and traditional maritime activity.

The operation of movable drilling rig on navigable waters implicates an identical relationship. Like pleasure boats, movable rigs regularly share the water with commercial vessels even when stationary. Since this interaction necessitates uniform rules, the potential disruption in maritime commerce caused by a damaged oil rig is related to maritime activity in a way which aviation is not.

B. *Liability*

The district court gave Houston Oil a judgment *in solido* against AITCO, OTM, and AMF Tuboscope. AITCO was held liable under Louisiana's strict products liability principles. OTM and AMF Tuboscope were found negligent. Defendants contend that the trial judge erred in his findings of fact and must be reversed. The district court's findings are protected by Fed.R.Civ.P. 52(a), and may be reversed only if found to be clearly erroneous, that is, if we are of the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*,333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948).

[3] Where there are two or more permissible views of the record evidence, an appellate court may not reverse the trial court's selection. *Anderson v. Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). That is the scenario before us today. All parties agree that the sub broke as a result of metal fatigue. Houston Oil blamed the failure on improper machining of the sub. A Houston Oil expert examined the pieces of the sub and concluded that the fillet radius had not been properly machined because of a notch near the box end. As explained by that expert, such a notch focused increased stress on the area and caused a crack and, ultimately, failure. A second expert agreed with this conclusion.

Defendants offered testimony of experts who said they found no evidence of a defect and expressed the opinion that the sub's failure was caused by misuse. The trial judge weighed this and other evidence, obviously making credibility assessments, and made factual findings in support of the opinions expressed by the Houston Oil witnesses. We are not prepared to say that any factual finding on liability is clearly erroneous. Those findings stand.

[4] Based on the court's findings of fact, its conclusions on liability are correct. AITCO's liability was premised on Louisiana products liability law which prescribes that

> [i]n order to recover from a manufacturer, the plaintiff must prove that the harm resulted from the condition of the product, that the condition made the product unreasonably dangerous to normal use, and that the condition existed at the time the product left the manufacturer's control. The plaintiff need not prove negligence by the maker in its manufacture or processing, since the manufacturer may be liable even though it exercised all possible care in the preparation and sale of its product.
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> * * * * * *
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> A product is unreasonably dangerous in construction or composition if at the time it leaves the control of its manufacturer it contains an unintended abnormality or condition which makes the product more dangerous than it was designed to be.

Halphen v. Johns-Manville Sales Corp., 484 So.2d 110, 113, 114 (La.1986). The trial court found that the sub contained an unintended abnormality, the notch in the fillet radius, which constituted a defect under Louisiana law. We agree.

[5] OTM was found negligent for the manner in which it machined the sub from standard steel stock. There is no error in the suggestsion that a reasonably prudent, careful machine shop would have machined a smooth fillet radius, free of any notch or scoring.

[6] Finally, the trial court concluded that AMF Tuboscope was negligent in its inspection of the device by "passing the tool for use." The evidence was in conflict but the court credited that which reflected that the inspector was aware of a machining groove but noted no defect in his report. The applicable legal standard is not disputed. Under *Williams v. Louisiana Machinery Co. Inc.*, 387 So.2d 8 (La. App. 1980), "[a]11 persons or entities holding themselves out as possessing certain skills or capabilities owe a duty to whomever procures their services to perform the task in a non-negligent, prudent and skillful manner." The trial court concluded that AMF Tuboscope failed to perform professionally in accordance with its obligation. We perceive no error in that conclusion.

C. *Indemnity*

[7] AITCO, liable as a consequence of the strict products liability principle, maintains that it should be indemnified by OTM and AMF Tuboscope who were negligent in machining and inspecting the sub, respectively. We are so persuaded. As the Louisiana Supreme Court recently observed in *Dusenberry v. McMoRan Exploration Co.*, 458 So.2d 102, 105 (La.1984),

> [w]hen liability *to the injured party* [here, Houston Oil] is imposed on one party on the basis of strict liability only and on a second party on the basis of negligence or actual fault, the strict liability defendant may recover full indemnity by incidental demand against the party actually at fault.

Louisiana's highest court qualified this broad rule in a footnote, reasoning that

> [i]ndemnity is only available when . . . the strict liability defendant is liable to the injured party on the basis of responsibility, imposed without

proof of negligence, for an unreasonably dangerous condition which the negligent defendant actually treated and which the strict liability defendant neither concurrently caused *nor had an opportunity to actually discover and remedy.*

Id., n. 3 (emphasis added). AITCO falls within the protected parameters of this rule, provided it had not opportunity to actually discover and remedy the defect. Prior to leasing the sub to Houston Oil, AITCO sought to determine if it contained any defects. AMF Tuboscope, an expert, was hired for that very purpose. The report given to AITCO gave no indication of any defect. Rather, AITCO received a green light to lease the tool. AITCO acted responsibly and it is entitled to indemnification from the negligent parties.

D. *Damages*

[8] The parties contest certain items of damage; defendants would prefer to pay less, Houston Oil would prefer to receive more. Damages involve factual determinations which we review under the clearly erroneous standard. *Belton v. Fibreboard Corp.*, 724 F.2d 500 (5th Cir.1984). We find qualifying error as to three items of damages.

[9,10] The district court refused to award damages for Schlumberger logging units ($7,109.00), drilling control monitors ($4,165.00), and communications charges ($1,838.00) incurred during the 22 extra drilling days. The court found that these were fixed costs which would have been incurred regardless of the accident. That finding is clearly erroneous. Houston Oil is entitled to recover the costs actually incurred during the additional days of work on the rig. Those costs include the costs of the logging units and monitors. Defendants' accountant conceded the

propriety of these costs if proven. They were adequately proven and should be allowed. We find no error in denial of the communications charges. The record reflects that these charges were primarily, if not totally, for relay equipment and services aboard a different rig. The record is not adequate to support a finding that these charges were for the exclusive use of the J. Storm IX, or that they resulted from the 22 additional days of drilling needed to bring the subject well to completion.

A more difficult damages issue relates to the propriety of overhead expenses. Houston Oil challenges the trial court's refusal to award damages for certain salaries and shoreside support facilities relevant to its Vermillion Block 75 operation.

[11] Under Louisiana law, overhead expenses, including salaries, directly incurred as a result of a tort, are recoverable items of damages. *Louisiana Power & Light Co. v Smith*, 343 So.2d 367 (La.App.1977); *Magnolia Constr. Co., Inc. v. Causey*, 421 So.2d 990 (La.App.1982). In this case, $11,304 claimed in engineering salaries were proved to be directly related to the 22 additional days and should have been awarded.The engineers billed their time to the projects to which they were assigned. The hours billed to the J. Storm IX during the extra drilling days are as much a direct, real, and compensable loss as the other expenses incurred as a consequence of the fishing and redrilling operation. The court erred in denying this item of recovery.

[12] We do not reach that conclusion, however, about the costs of the dock and helipad facilities Tenneco maintains at Intracoastal City, Louisiana for support of its offshore operations. Under Tenneco's internal operating procedures, each rig served by the facilities was charged a pro rata portion of their total cost. The sum of $159,091 was

charged to the J. Storm IX during the 22 additional drilling days. Houston Oil maintains that it should recover that cost.

Our resolutiin of this issue is guided by the detailed discussion of damages in *Louisiana Power & Light Co. v. Smith*, a case involving a broken power pole in which the court quotes at length from *Ohio Power Co. v Huff*, 12 Ohio Misc. 214, 231 N.E.2d 897 (1967):

> Damages musts be proximate and cannot be remote or speculative. There is no logical or legal connection between the breaking of a wooden power pole by the defendant and salaries of clerks in offices, superintendents of construction, distribution superintendents, safety coordinators, general office accounting personnel, supervisors of transmission and distribution, supervisors of labor relations, etc. The salaries of these persons whose salaries are fixed, did not flow from, nor were they affected by the negligence of the defendant. These salaries and expenses would have been paid if the defendant had not broken the pole and damaged the connected facilities. Such operating expenses might be proper in fixing a rate schedule, but we do not feel that they have anything to do with damages to a power pole.
>
> If we try to compute by a percentage, as claimed by the accountant of the plaintiff, the percentage would be the same if one, fifty, or no poles were destroyed, and would not be affected by the number of items charged to the inventory. Fixed income employees and store expenses are remote matters from the accident which the defendant had.

The *Huff* court in turn *quoted* the Ilinois Supreme Court's decision in *Central Illinois Light Co. v. Stenzel*,

44 Ill.App.2d 388, 195 N.E.2d 207 (1964):

> In so holding, this court is congnizant of the complex costs of operation of a business such as that of the plaintiff, but at the same time, this court cannot see any thread of continuity, any relation, whatsoever, between the cost of operation of the plaintiff, and the damages occasioned by the defendant breaking the pole of the plaintiff. We think the rule of damages which requires that the damages must be those that flow as the natural consequence of the negligence of the defendant must not be ignored. In doing so, we are not ignoring the facts of business life, but following the law of damages.

Although we sit as a Lands Act court and not an *Erie* court, and as such are not irrevocably bound to follow an intermediate state appellate court decision, we are convinced of the soundness of the *Smith* court's analysis and opt to follow it. In the case at bar, the failure of the sub did not cause the costs of the dock facilities and helipad to be incurred. Those expenses existed independent of the J. Storm IX. That is in contrast to the expenses for the engineers whose work was specifically for that rig during the extra drilling days. But for the accident, the work of the engineers would not have been necessary. Likewise the drilling control monitors and logging units would not have been used for additional days had the accident not necessitated extra drilling. The same cannot be said as respects the dock and helipad facilities.

Finally, defendants object to an award of $115,722 for mud and chemicals supplied by N.L. Bairod during the 22 days. We find ample record support for that award.

E. *Interest*

[13] The judgment as modified by the district court allowed prejudgment interest at 12% per annum, as required by Louisiana law, La.R.S. 13:4203 and Civil Code art. 2924, and postjudgment interest as prescribed by federal law. Houston Oil contends that it is entitled to the higher Louisiana rate both prejudgment and post-judgment. We do not agree.

Although earlier writings involving interest in Lands Act cases, *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983); *Aymond v. Texaco, Inc.*, 554 F.2d 206 (5th Cir. 1977); *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), seemed to preclude pre-judgment interest, more recent decisions have permitted such. In *Olsen v. Shell Oil Co.*, 708 F.2d 976, 984 (5th Cir. 1983), we held that "where . . . a district court awards prejudgment interest to a prevailing [Lands Act] plaintiff whose remedy is based on surrogate state law, the award should not be disturbed on appeal if supported by that state law." More recently we have required such an award and have remanded for modification of judgment to award prejudgment interest. *Haas v. Atlantic Richfield*, 799 F.2d 1011 (5th Cir. 1986); *see also Smith v. Shell Oil Co.*, 746 F.2d 1087 (5th Cir. 1984). Whereas the right to prejudgment interest under state law has evolved, the *Berry-Aymond-Musial* line of cases requires that post-judgment interest be at the federal rate. The district court did not err in its assessment of interest.

Conclusion

The judgment of the district court is MODIFIED, as discussed herein, and, as modified, the judgment is AFFIRMED. The matter is returned to the district court for entry of a judgment consistent herewith.

MODIFIED and AFFIRMED.

Filed Oct 30 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4360

HOUSTON OIL & MINERALS CORP.,
Plaintiff-Appellee Cross-Appellee and
Cross-Appellant,

v.

AMERICAN INTERNATIONAL TOOL
COMPANY, Defendant-Appellee Third
Party Plaintiff Cross-Appellant and
Cross-Appellee,

GIBRALTER INSURANCE COMPANY,
Defendant-Appellant,

v.

AMF TUBOSCOPE, INC.,
Defendant-Appellant,
Cross Appellee,

PINE TOP INSURANCE COMPANY,
Defendant-Appellant,

v.

ARMCO, INC., Defendant,

Marine Drilling Company, Third Party
Defendant-Appellee

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09-24-87, 5 Cir., 198__, _____F.2d____)

(October 30, 1987)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz

United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed Feb 21 1986

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Houston Oil and Minerals Corporation (HOM), brought this products liability, strict liability and negligence action seeking to recover damages allegedly incurred as a result of the failure of a mud saver sub during offshore drilling operations. As damages HOM alleges that it is entitled to 50% of the money expended on the well during a 48 day delay which resulted from the sub's failure.

The matter came on for trial before the court and the court, having considered the record, the testimony and exhibits, and the proposed findings submitted by counsel, together with the applicable law, finds as follows:

FINDINGS OF FACT

The Parties

The parties to this lawsuit are as folows:

1. Plaintiff: Houston Oil & Minerals Corporation (HOM), a wholly owned subsidiary of Tenneco, Inc., was the operator of the well which was being drilled off the Louisiana coast by the Oil Rig J. Storm IX. HOM holds a 50% interest in the well.

2. Defendants:

A. ARMCO, Inc., manufactured the steel bar stock from which the sub was manufactured. The allegation of liability against ARMCO was that the steel was defective and the defect caused or contributed to the failure of the mud saver sub.

B. Metal—X Corporation received the bar stock from ARMCO, bored a hole through it and sold it to Oil Tool Machine.

C. Oil Tool Machine, a machine shop, fabricated the mud saver sub and sold it to American International Tool Company (AITCO).

D. AITCO, the owner of the mud saver sub, prepared the plans for fabrication and placed the valve inside the sub. AITCO had the sub inspected, stamped it for rental purposes, and sent it into the field for use. The sub in question was identified as sub 4916.

E. AMF Tuboscope inspects oil field equipment and performed the original full-length inspection and subsequent end-only inspection of the mud saver sub in question.

F. Gibralter Insurance Company is the primary insurer of AITCO.

G. Pine Top Insurance is the excess insurer of AITCO.

3. Third Party Defendants:

A. Marine Drilling Company was the contractor on the well. The contractor performs all operations on the well pursuant to the supervision of a representative of the operator. It was stipulated prior to trial that Marine Drilling and HOM had resolved their contractual differences and Tenneco has agreed to indemnify Marine Drilling for its liability for the failure of the sub.

B. Dupree, Godchaux, Carrier Insurance Agency was the insurance agent of OTM and has been sued by OTM. OTM alleges that Dupree, Godchaux, Carrier failed to obtain proper insurance coverage for OTM which would cover the claims made against it in this lawsuit.

Design and Manufacture

4. A mud saver sub is a tubular tool located between the kelly and the drill pipe. The sub in question was machined from 4145 heat treated steel and is approximately 3 feet in length with box and pin end connections. The center of the housing is bored out so that an internal one-way spring valve could fit inside. Machined into the steel is a recessed area approximately six inches in length and one eighth of an inch deep which is cut around the entire circumference of the sub. A rubber protecter is placed in this area to protect the sub from hitting the casing. Because this recessed area creates a change in the outer diameter of the sub, stresses placed on the sub during drilling tend to concentrate there. In order to reduce the

intensity of the stress, the edges of the recessed area were machined as a single smooth curve. The edges are called fillets. A curved fillet acts as a much better stress reliever than a fillet cut at 90 degree angles. The mud saver sub has two fillet radii, one near the pin-end connection, the other near the box-end.

5. A mud saver sub serves two purposes: The lower joint of the mud saver sub, which is the pin-end of the sub, is the joint broken out when pipe is added to or taken from the drill pipe assembly. The process of breaking pipe out is abusive and can damage the connection. The mud saver sub protects the pin-end threads of the kelly, which would otherwise be the most frequently broken connection. The mud saver sub also prevents the column of mud in the kelly from falling to the drill floor once the connection is broken.

6. Four or six new subs were delivered by OTM to the AITCO shop in late 1981. Serial numbers were put on the new subs in paint or crayon until permanent numbers were stamped into the metal.

7. AITCO employed AMF Tuboscope, an inspection company to perform a "full-length dry power magnetic particle inspection" on the new subs. The purpose of such test is to detect cracks in the metal. A magnetic particle test is performed by applying a magnetic field to the surface of the metal to be inspected. Metal filings are dusted on the entire external surface of the metal to be inspected and the internal connection threads. The powder is then blown off. If powder remains on the surface a crack is indicated. The inspector then files the surface area and repowders it to determine if a crack really exists or whether it is merely a surface scratch.

8. Mike Acosta, an inspector from AMF Tuboscope performed the full-length inspection on sub 4196, the sub in

question, on December 1, 1981. There is conflicting testimony regarding whether the inspector found a machining notch when the sub was inspected at this time.

9. AITCO shop foreman, Riley Schexnayder testified that the inspector thought he found a crack in one of the new subs. The inspector then showed Mr. Schexnayder the sub and indicated the fillet radius nearer the box end. The inspector told Mr. Schexnayder that he checked the area thoroughly and did some filing on the surface and determined that it was just a machining groove that went approximately three-quarters of the way around the fillet radius. Sid Robin, a dispatcher for AITCO at that time, testified that he overheard part of this conversation and acknowledged that the conversation did take place.

10. Mike Acosta denied having made these statements. His inspection report indicated that sub 4916 had no defects.

11. Schexnayder inspected the tool himself and saw no visible signs of any groove. Relying upon the advice of the AMF Tuboscope inspector he did not remove the tool from use.

12. After the inspection, Schexnayder had one of his workers stamp the serial numbers on the subs. The digits on the sub which allegedly had a machining grove was improperly stamped and as a result, one digit was out of line.

13. Rather than have the employee grind the number off and restamp it, Schexnayder left the number as it was stamped and in the event any question later arose concerning this particular sub, he wanted it identified.

Use of the sub and its eventual failure

14. After the sub was inspected, it was rented to Tenneco in December 1981. A leak was found the sub was returned for repair. The box end was refaced by OTM at AITCO'S request.

15. The sub was then reinspected by AMF Tuboscope. Since the sub was considered used, only the box and pin-end connections were inspected. A limited inspection of this type is customary for used subs.

16. The inspector, Henry Broussard, found that the box-end of the tool was galled and rendered a report recommending that it be re-machined. The work was performed by OTM, and the mud saver sub was rented to HOM for a second time.

17. On January 4, 1982, the mud saver sub in use on the J Storm IX rig cracked and parted into two sections at the sub's fillet radius.

18. The vertical depth of the hole was 14,649 feet. At the time the mud saver sub parted the hole was being reamed and the bit was approximately 375 feet from the bottom of the hole.

19. Reaming is a process in which the surface of the open hole is cleaned and smoothed. As a result of the sub's failure, the pipe below the sub fell to the bottom of the hole. Thus, the top of the pipe was approximately 375 feet from the surface.

20. After the parting of the mud saver sub, fishing operations commenced in order to retrieve the drill string which fell into the hole.

21. The broken part of the mud saver sub, which was the upper most tubular component in the hole was

retrieved by use of an "overshot". An overshot is a tool used in fishing expeditions which has an inside diameter larger than the outside diameter of the tubular member which is being fished from the hole. If properly used, an overshot comes down over the fish and a grappel on the inside of the overshot attaches to the fish so that it can be removed from the hole. The overshot also served as a conduit through which drilling fluids can be circulated through the drill string sought to be retrieved. To keep the mud from going around the outside of the fish a "pack-off" or rubber seal inside the overshot surrounds the fish.

22. Mr. Wellborn, a Tenneco engineer, was on the drilling rig when the lower half of the mud saver sub was retrieved. He inspected the sub and found a shiny feathered area of erosion diagonally across the pin-end connection of the sub to the joint of pipe below.

23. Mr. Wellborn examined an overshot of the same size and specifications as used in the fishing operation. He determined that the pack off and bowl of the overshot used in the fishing operation would have come down over the fish just at the point where the pin-end of the mud saver sub was connected to the tool joint below. When the pack-off eroded the forces of the drilling fluid not only ate away the bowl of the overshot, but caused surface erosing across the face of the pin-end connection of the mud saver sub to the drill pipe below.

24. Fishing operations were ultimately unsuccessful and the well had to be sidetracked and redrilled.

Damages

25. The parties stipulated that plaintiff was entitled to 50% of $1,026,370 in damages sustained as a result of the failure of the sub for charges owed to Marine Drilling

Company. The parties agreed that the above figure could be reduced if the Court found that a portion of the redrilling was not attributable to the defendants.

26. In addition, the parties stipulated to the following damage amounts:

Source	$
Wilson Downhole Services	12,591.
Patterson Rental Tools	64,977.
Petco Rental Tools	390.
Pipe Protectors, Inc.	5,218.
Sam Broussard Trucking	132.
Segura's Trucking	7.
Servco	2,021.
Sperry-Sun	31,960.
Roy Young, Inc.	1,229.
Totco Drilling Instrumentation	639.
Tri-State Oil Tool	26,234.
The Offshore Telephone Company	3,322.
Oilfield Rental Service	27,916.
Oil and Gas Rental Services	62,122.
Acme Truck Lines	272.
B. J. Hughes	73,817.
B & M Oilfield Supply	304.
BGX	60.
Bibbens & Rice	696.
Christensen Diamond	2,600.
Delta Rental Service, Inc.	9,956
O.C.S., Inc.	28,130.
Dresser Industries	4,165
Fluid Dynamics, Inc.	2,450.
Gray Tool Company	4,377.
Halliburton	84,354.
Homco	17,130.
Howard Trucking	297.
Hughes Tool Company	5,756.

Hunt Oil Tool	8,729.
Keller Oilfiled Services	1,806.
N. L. Baroid	8,700.
N. L. Logging Systems	78,242.
Greg's Transportation	124.
Gulf Fleet Marine	150.
Segura's Trucking	7.50
Wilson Downhole Services	
Invoice 156432-D	5,800.
Invoice 156506-D	26,184.20
Invoice 156442-D	54,159.99
Oil & Gas Rental Services	62,917.94
B. J. Hughes	5,595.00
Delta Rental Service	24,622.
G. H. Stabil Drill	3,105.
	753,264.63
OWNERSHIP PERCENTAGE	50%
	376,532.31

27. Thus, the parties stipulated that $1,779,634.63 ($1,026,370.00 + 753,246.63) was possibly incurred in the cost of fishing and redrilling the well and that one-half of these costs ($889,817.31) were due to the plaintiff should it prove liability.

28. In addition to the stipulated amounts plaintiff claims that they are entitled to one-half of the following as damages:

a. $2,374.65 owed to LBS Industrial Supply for mooring rope;

b. $3,153.00 owed to Gulf Fleet Marine for supply deliveries;

c. $7,109.00 for the rental of a Schumberger Unit;

d. $4,165.00 for the rental of drilling control monitors;

e. $1,838.00 for communications equipment located on another platform;

f. $218,890.66 for vessel charges;

g. $3,637.00 for drilling fluid;

h. $39,908.00 for fuel charges;

i. $11,304.00 for Tenneco salaries of company representatives; and

j. $159,091.00 for use of the Tenneco IntraCoastal City Facility.

Trial

29. The case came for trial on September 9, 1985. OTM, which was insolvent at that time, was not represented by counsel at the trial. By Order, the District Court severed OTM's claim against its insurance agent.

30. The remnants of mud saver sub 4916 have been examined by numerous experts for each of the parties. All experts agree that the sub parted because of fatigue overloading. The experts disagree on the cause of the initiation of the fatigue crack.

31. The first metallurgist/mechanical engineer who looked at the sub, John Tabony of Baton Rouge, stated that the fatigue was not caused by the machining of the part. He testified that he saw no notch, no machine flaw and found the radius to be quite generous.

32. Dr. Stanford Smith, Professor of Mechanical Engineering at the University of Southwestern Louisiana in Lafayette found a flaw in the radius. In Dr. Smith's opinion, the sub failed because the notch in the fillet radius

could not withstand the normal operating stresses, thus creating a crack which propagated across the cross section of the radius of the fillet until the sub could no longer hold the weight of the drill string. Dr. Smith did not have an opportunity to observe the entire fillet radius. He was able to put the two sides of the radius back together because there was no smearing or yielding on the metal of the two surfaces. This permitted Dr. Smith to observe the radius in the same condition as it was prior to the failure. He testified that he was certain he was able to see the radius as it was prior to the failure and that the radius contained a notch or a sharp point that started a fatigue crack when the sub was put in service.

33. Dr. Andrew McPhate, a professor of Mechanical Engineering at Louisiana State University, found no indications of a notch and found that the major crack was not where the alleged notch was located. He concluded that the fatigue failure was due to improper handling as evidenced by a washout. See paragraph 22 above.

34. Mr. Paul Montgomery, a consulting Petroleum Engineer worked as a company overlooker for Tenneco. In his opinion abnormal drilling operations lead to the failure of the sub.

35. Other experts, Stephen Killingworth and Stephen A. derson, also opined that the failure was due to an overload.

36. Carl Loper, an expert in the field of metalurgical engineering, testified that he saw the notch. He found the notch by using magnifying and lighting systems and was present when a magnetic particle test was performed. He concluded that the fatigue crack was initiated "due to the sharp, uneven contour of the lower radius and the gouges formed by the machining of the groove. These features

served as stress concentrators, magnifying the forces applied to the radius to a degree such that fatigue cracking occurred."

37. At the close of the plaintiff's evidence, Armco and Metal-X moved for an involuntary dismissal under Rule 41(b), F.R.C.P., arguing that no credible evidence of a defect in the metal had been presented. The Court agreed with this argument, and granted the motion. AITCO, AMF Tuboscope and Marine Drilling voluntarily dismissed their third-party claims against Metal-X and Armco thereafter.

38. The Court finds that the casualty occurred due to improper machining of the fillet.

CONCLUSIONS OF LAW

The basis of this Court's jurisdiction is the Outer Continental Shelf Act, 43 U.S.C. §1333. Under this statute the Louisiana law of strict liability, negligence and products liability apply to this case.

The Court has made detailed findings concerning the events leading up to the failure of the mud saver sub. To the extent that these findings also constitute legal conclusions they are incorporated herein.

Plaintiff alleges that AITCO is strictly liable as custodian of a thing under LSA C.C. Art. 2317 or that AITCO and OTM are strictly liable as manufacturers of a defective product. In addition, plaintiff contends that AITCO, OTM and AMF Tuboscope were negligent as follows: AITCO knowingly allowed the mud saver sub with a machining groove in its fillet radius to be sent out on a job; OTM negligently manufactured the sub; and, AMF Tuboscope failed to properly and adequately inspect or warn of the inherent dangers of a machining groove in the fillet radius.

LSA C.C. Art. 2317 states in part: "We are liable, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are responsible, or of the things which we have in our custody . . . . " As stated in *Washington v. T. Smith & Son,* 68 So.2d 337, at page 346, "The article means by things in ones custody, such things over which that person maintains supervision and control. The whole basis of tort liability, so far as physical liabilities are concerned, at least lies in control."

Negligence

In a typical negligence case against the owner of a thing which is actively involved in the causation of injury, the claimant must prove the following: (1) That something about the thing created an unreasonable risk of injury that resulted in the damage; (2) that the owner knew or should have known of that risk; and (3) that the owner failed to render the thing safe or to take adequate steps to prevent the damage caused by the thing. Under traditional negligence concepts, the knowledge (actual or constructive) gives rise to the duty to take reasonable steps to protect against injurious consequences resulting from the risk, and no responsibility is placed on the owner who acted reasonably but nevertheless failed to discover that the thing presented an unreasonable risk of harm. *Kent v. Gulf States Utilities,* 418 So.2d 493 (La. 1982).

AITCO

Here the machining notch at the fillet radius created an unreasonaable risk of injury that resulted in damage. AITCO employed AMF Tuboscope to inspect the sub for cracks before it was put in use. There is conflicting testimony regarding whether the inspector actually found a crack or notch, nonetheless, the tool was passed for use in the field by the inspection company representative.

AMF Tuboscope is a reputable firm which utilizes well-recognized industry methods for inspection. The court is of the opinion that AITCO acted reasonably in relying on the inspector's report.

AMF Tuboscope

The standard of care applicable to a supplier of services, such as Tuboscope, is defined in *Williams v. Louisiana Machinery Company, Inc.*, 387 So.2d 8 (La. App. 3rd Cir. 1980), as follows: "All persons or entities holding themselves out as possessing certain skills or capabilities owe a duty to whomever procures their services to perform the task in a non-negligent, prudent and skillful manner." Reasonable skill and care in Tuboscope's case means the skills and knowledge normally possessed by members of his profession. Restatement (Second) of Torts § 299A (1965).

Ray Smith, a metallurgist employed by Metal X, testified that a non-destructive inspector such as Tuboscope inspector Mike Acosta, is obligated to inform the owner of the tool of a machining defect. Here, Acosta informed AITCO of the groove but passed the tool for use. By passing the tool for use in field Tuboscope impliedly recommended that the machining groove did not jeopardize the integrity of the tool. The court finds that AMF Tuboscope was negligent in passing the tool for use in the field when it knew or should have known of the risks created by a machining groove located in the fillet radius of the sub.

OTM

Furthermore, the court finds that OTM, the machine shop which fabricated the sub, was negligent for failing to properly machine the fillet radius and for failing to

properly inspect the sub for deformities.

Product Liabilities

In *Penn v. Inferno Manufacturing Corp.*, 199 So.2d 210 (La.App. 1st Cir. 1967), the Louisiana Appellate Court analyzed the liability of a seller who sold his own product which was manufactured by a different company. The court quoted *Carney v. Sears, Roebuck & Co.* 309 F.2d 300 (4th Cir. 1962) as follows:

> The undisputed evidence in the record shows that the defendant was not the manufacturer of the ladder. The ladder was manufactured by J. R. Clark Company of Minnesota, but the name of the manufacturer does not appear any place on the ladder and the defendant's name appears on the label attached to the ladder. There was no indication either about the merchandise or in the newspaper that anyone other than the defendant had anything to do with this product.

309 F.2d at 302.

The court cited the following language from the Restatement of the Law of Torts, Col. 2, Sec. 400, Comment C:

> One who puts out as his own product chattels made by others is under a duty to exercise care, proportionate to the danger involved in the use of the chattels if improperly made, to secure the adoption of a proper formula or plan and the use of safe materials and to inspect the chattel when made. But he does not escape liability by so doing. But putting a chattel out as his own product, he causes it to be used in reliance upon his care in

> making it. Therefore, he is liable if, because of some negligence in its fabrication or through lack of proper inspection during the process of manufacture, the article is in a dangerous defective condition which the vendor could not discover after it was delivered to him.

309 F.2d at 304.

The court explained the purpose of this rule as follows: ——

> The basis of the rule is that where the vendor puts only its name upon the product without indicating that it is actually the product of another then the public is induced by its reasonable belief that it is the product of the vendor to rely upon the skill of the vendor and not upon the skill of any other.

As previously stated, this court finds that the mud saver sub in question was negligently manufactured, rendering it dangerously defective.

Based on the foregoing, the court finds that AITCO is jointly liable to the plaintiff for the damage caused by the defective mud saver sub, since it labeled, sold and rented the sub as its own product.

Damages

As previously stated in Paragraph 25, *supra*, the parties stipulated that plaintiff was entitled to 50% of $1,026,370 in damages sustained as a result of the failure of the sub for charges owed to Marine Drilling Company if liability was found in favor of the plaintiff. The parties agreed that the above figure could be reduced if the court found that a portion of the redrilling was not attributable

to the defendants.

The court is of the opinion that the above figure is due to be reduced by $73,000 for the following reason:

On January 11, the control lines of the rig's blowout preventers froze due to cold weather. Fishing could not continue during that time since any operation, including both fishing and drilling of a well with inoperable blowout preventers is contrary to federal regulations. Thus, while the frozen blowout preventers delayed fishing they would have delayed drilling for the same amount of time if the mud saver sub had never parted and drilling had proceeded. Thus, the same expenses would have been incurred during the freeze regardless of the failure of the mud saver sub. Since these expenditures which were included in the above figure were not caused by the sub's failure, plaintiff's recovery must be reduced by $73,000. *Waggoner v. Marquette Casualty Co.*, 181 So. 2d 475 (La. App. 2nd Cir. 1965).

Defendants also seek a reduction of $46,400 for lost time due to the parting of bowen oil jars used in the fishing operation. Mike Wellborn, a Tenneco Company Representative, testified that the oil jar has an explosive charge in it to loosen the drill pipe that is stuck in the hole. The explosive charge causes the jar to break. The court finds that no reduction will be made for this claim.

Thus, Houston Oil is entitled to 50% of $953,370 for charges owed to Marine Drilling. In addition, Houston Oil is entitled to 50% of the stipulated damage amounts contained in Paragraph 26, *supra* which amounts to $753,264.63.

Finally, defendants contend that Houston Oil failed to prove that the following damages (contained in

Paragraph 28, *supra*), were directly attributable to the sub's failure:

(a) Plaintiff claims as damages $2,374.65 owed to LBS Industrial Supply for mooring rope. The court finds that rope purchased during the period of redrilling the well is not an appropriate item of damage since its relation to the failure of the mud saver sub was not established.

(b) Plaintiff claims $7,109.00 for the rental of a Schlumberger Unit. The court finds that this is a fixed item of rental which follows the rig from location to location and from well to well. This cost would have been incurred regardless of the failure of the sub because the unit was on the rig a considerable time before the failure and a considerable time afterwards. It is not a proper element of damage.

(c) Plaintiff claims $4,165.00 for the rental of drilling control monitors. The court finds that this is a fixed rental item which follows the drilling rig from site to site and thus, rental costs are not attributable to the failure of the sub.

(d) Plaintiff claims $1,838.00 for the communications equipment located on another drilling platform. The court finds that this is a fixed cost which was not attributable to the failure of the sub.

(e) Plaintiff claims $40,352.14 for helicopter charges. Mr. Bill Aguire, Senior Accountant at Tenneco, testified regarding the method of allocation for the helicopter charges. The charges are based on the number of passengers and loads that are taken by helicopters to each job site. The court finds that this is an appropriate item of damages.

(f) Plaintiff first claimed $386,413.86 in damages for vessel charges. However, parties agree that $218,890.66 is the appropriate figure attributable to vessel charges incurred during the redrilling of the well.

Thus, the court finds that Houston Oil is entitled to 50% of the following:

(1) $953,370 for charges owed to Marine Drilling;

(2) $753,264.63 for damage amounts stipulated to by the parties if liability was found in favor of Houston Oil; and

(3) (a) $40,352.14 Helicopter charges

(b) $218,890.66 vessel charges

(c) $119,772.00 mud and chemicals

(d) $39,908.40 fuel charges

(e) $3,637.00 chemicals

(f) $3,153.00 supply delivery costs

(g) $159,091.00 Tenneco Icy Facility.

Total damages amount to 50% of $2,487,438.83, or $1,143,719.41.

Having considered the matter, the court finds that Houston Oil is entitled to damages amounting to $1,143,719.41, joint and severally against OTM, AMF Tuboscope and AITCO, together with interest at a legal rate from the date of the Judgment until paid.

A Judgment will be entered in accordance with the above Findings of Fact and Conclusions of Law.

DONE this the 19th day of February 1986.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 2-24-86
By Lp
To: All counsel
of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed Feb 21 1986

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered this date in the above-styled case, it is

ORDERED, ADJUDGED and DECREED by this Court that Judgment is hereby entered in favor of the plaintiff and against the defendants, OTM, AMF, Tuboscope and AITCO jointly and severally, in the amount of ONE MILLION, ONE HUNDRED FORTY-THREE THOUSAND, SEVEN HUNDRED NINETEEN AND 41/100 DOLLARS ($1,143,719.41), together with interest at the rate of 7.71% from this date until the Judgment is paid.

Costs are to be taxed against the above-named defendants.

DONE this the 19th day of February 1986.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed MAR 3 1986

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

It has been brought to the Court's attention that the Findings of Fact and Conclusions of Law, which were entered in the above case on February 19, 1986, through oversight, omitted (g) through (l) under the damages section of the Conclusions of Law. Hereto attached is an "Addendum" containing these omitted section, to be a part of the original Findings of Fact and Conclusions of Law.

The Court also adds the following paragraph which is to be inserted after the second complete paragraph on the last page of the Conclusions of Law.

The Court has reviewed all counterclaims filed in this suit and concludes that all of the claims are without merit.

In all other respects, the Court's Findings of Fact and Conclusions of Law, remain in full force and effect.

DONE this the 28th day of February 1985.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

ADDENDUM

(g) Plaintiff claims $115,772.00 in damages for mud and chemicals used in the drilling operations. This charge is based on the beginning and ending inventory of chemicals supplied by NL Bariod and the Tenneco Morning Reports. The court finds that this is an appropriate item of damages.

(h) Plaintiff claims $3,637.00 for drilling fluid used in drilling operations. The court finds that this is an appropriate item of damages.

(i) The parties agree that $39,908.40 is an appropriate damage cost attributable to the cost of fuel. The court finds that this is an appropriate item of damages.

(j) The parties agree that $3,153.00 is an appropriate damage cost for money owed to Gulf Fleet Marine for delivery of supplies to the drilling platform. The court finds that this is an appropriate item of damages.

(k) Plaintiff claims $11,304 for Tenneco salaries of company representatives who supervised the fishing and redrilling operations. The court finds that this is an improper charge since this cost would have been incurred by Tenneco regardless of the failure of the sub.

(l) Plaintiff cliams $159,091.00 damages for use of the Tenneco IntraCoastal City Facility. This is a permanent vessel docking and helicopter facility owned by Tenneco. The cost for this facility is charged only against working properties. The fishing and drilling operations caused some 22 extra days of charges to the well in question which would not have been incurred otherwise, and therefore the court finds that the charge is proper.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed APRIL 21 1986

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

AMENDED JUDGEMENT

The Judgment of February 19, 1986, is hereby amended to include the following: As the insurers of American International Tool Company, Gilbralter Insurance Company and Pine Top Insurance Company are hereby named as defendants and jointly and severally liable with other defendants to the extent of their policy coverage. In addition, pursuant to Louisiana Revised Statute 13:4203, prejudgment interest is hereby awarded to Houston Oil & Mineral Corporation in the amount of 12% per annum from August 24, 1984, to date of judgment.

In all other respects the court's judgment remains in full force and effect.

DONE this the 18th day of April 1986.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed MAY 7 1986

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

AMENDMENT

The Amended Judgment of April 18, 1986, in the above-captioned case is hereby AMENDED by deleting the date of August 24, 1984, as the date from which pre-judgment interest is to begin accruing, and said date shall be replaced with the date of August 25, 1982.

In all other respects the Court's Amended Judgment of April 18, 1986, shall remain in full force and effect.

DONE this the 2nd day of May 1986.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed MAY 15 1986

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

ORDER

Defendants, AMF Tuboscope, Inc. and Oil Tool Machine, Inc., have moved this court to set aside the Findings of Fact and Conclusions of Law heretofore entered on February 19, 1986, and to vacate and set aside the Judgment which was entered on that same date, and grant new trial pursuant to Rule 59(a), Fed. R. Civ. P.

The Court being fully advised of the premises, hereby ORDERS that said motions be DENIED.

It is further ORDERED that motion to amend the rate of post-judgment interest is DENIED.

DONE this the 9th day of May 1986.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Filed NOV 12 1987

HOUSTON OIL & MINERALS CORPORATION Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 82-2123"L"
AMERICAN INTERNATIONAL TOOL COMPANY, ET AL, Defendants.	*	

AMENDMENT

In accordance with the September 24, 1987, order entered by the United States Court of Appeals for the Fifth Circuit, this Court's Judgment entered February 19, 1986, is hereby AMENDED as follows:

Damages:

The plaintiff, Houston Oil & Mineral Corporation is entitled to additional damages for, (1) rental of the Schulumberger Unit ($7,109.00); (2) rental of the drilling control monitors ($4,165.00); and, (3) salaries of Tenneco Company representatives ($11,304.00), said damages found to be a proximate result of the rigging accident. As the plaintiff previously stipulated that it is only entitled to fifty percent of the aforementioned damage figures, the defendants OTM, AMF Tuboscope and AITCO are hereby held jointly and severally liable for additional damages in

the amount of $11,289.00.[1]

Liability

As the Court of Appeals determined that AITCO, found strictly liable, was liable on the basis of responsibility imposed without proof of negligence, for an unreasonably dangerous condition which the negligent defendant actually treated and which the strict liability defendant neither concurrently caused nor had an opportunity to actually discover and remedy, defendants OTM and AMF Tuboscope are jointly and severally liable for complete indemnification of defendant AITCO as to any damages assessed against AITCO.

In addition, pursuant to Louisiana Revised Statute 13:4203, prejudgment interest is hereby awarded to Houston Oil & Minerals Corporation in the amount of 12% per annum from August 25, 1982, to date of judgment.

In all other respects the court's judgment remains in full force and effect.

DONE this the 9th day of November 1987.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

[1] The total of the additional damages is $22,578.00. Fifty percent of said figure is $11,289.00.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

HOUSTON OIL &
MINERALS CORPORATION

versus

CIVIL ACTION
NO. 82-2123"L"

AMERICAN
INTERNATIONAL TOOL
COMPANY, ET AL,

CORRECTED AMENDMENT

The Court has been advised by counsel for the remaining parties to this litigation that its "Amendment" of November 9, 1987, contains an arithmetical error, in that it does not reduce this Court's original judgment by one-half of $159,091.00.

That amount represents costs of dock and helipad facilities which Tenneco maintained at Intracoastal City, Louisiana, for support of its offshore operations. An award for those costs was made to the plaintiff by this Court in its original judgment, but was disallowed by the Fifth Circuit in its opinion of September 24, 1987.

For that reason, the "Amendment" which was issued by this Court on November 9, 1987, is hereby corrected, so as to reduce, by $79,545.50, the award which has been made in favor of the plaintiff, Houston Oil & Minerals Corporation.

The Court notes that the original amount of that judgment was $1,143,719.41; the action taken by the Fifth

Circuit has increased the principal amount of the judgment by $11,289, and has decreased it by $79,545.50. The principal amount of the judgment now stands, therefore, at $1,075,462.90.

In issuing this "Corrected Amendment," the Court reserves to AMF Tuboscope, Inc., the right to contend that this Court did not possess jurisdiction to issue the "Amendment" or this "Corrected Amendment" or to make such other objection to both pleadings as it may deem fit and proper.

THUS DONE AND SIGNED at Mobile, Alabama, on this 14 day of December, 1987.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

Approved as to form, all rights reserved:

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